INDEX.

ABATEMENT.

1. A suit that has abated by the death of the principal in a Sheriff's bond, cannot be revived against the sureties, when the original summons was never served on the sureties. *Erwin* v. *Lawrence*, 282.

2. Under C. C. P. sec. 64, sub secs. 3 and 4, an action does not abate by the death of the plaintiff, unless so adjudged by the Court. That section invests the presiding Judge with plenary powers in the premises, which is not the subject of revision by this Court, unless there appears an abuse of those powers. *Baggarly* v. *Colvert*, 688.

See EJECTMENT, 1.

ACCEPTANCE.

See BILLS, BONDS, &c., 11, 16.

ACCOUNT.

See PLEADING, 2, 3.

ACTIONS CIVIL.

1. A complaint seeking to charge the lessee of the N. C. Railroad with damages, for refusing to transport the complainant, to whom the lessor of said road had issued a free pass for life, not alleging any obligation on the part of the lessee, by contract or otherwise, to carry the complainant over the road, free: *Held* to be bad on demurrer, and that the Judge below was right in dismissing it. *Turner* v. *Richmond & Danville R. R.*, 1.

2. The free pass given by the lessor, the N. C. Railroad Company, was only a license, without any consideration in law, which that Company could revoke at pleasure, and did revoke by leasing the road to the defendant. *Ibid.*

3. The North Carolina Railroad Company, as well by its charter, Act of 1848 and 1849, chap. 82, and the supplemental Acts thereto, as upon general principles, has the power to deposit or loan its surplus funds, and of course may bring the necessary actions to recover the sums loaned. *N. C. R. R. Co.* v. *Moore*, 6.

4. When the question of the right, or title to an office is put in issue, *mandamus* is not the form of action, the appropriate remedy being an action in the nature of a *quo warranto*; nor will *mandamus* lie, when two persons claim the duty adversely to each other, against a third party. *Brown* v. *Turner and Howerton*, 93.

5. Any person having a right to office, can, in his own name, bring an action for the purpose of testing his right against one claiming adversely. *Ibid*

6. A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received, against a mere intruder, who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. *Howerton* v. *Tate*, 161.

7. The right of action accruing upon the following instrument: "This is to show that half the hire of Randall hired to Larkin Brooks is Moses Jones, December 29th, 1853," did not arise until a demand and refusal, at which time the statute of limitations began to run. *Jones* v. *Woods*, 447.

8. An action for deceit in the sale of a mule—an action *ex delicto* under the old system—is not within the jurisdiction of a Justice of the Peace, as provided in Art. IV, sec. 33, of the Constitution. *Bullinger* v. *Marshall*, 520.

9. Action against a Board of County Commissioners must be brought to the Superior Court of the county wherein those Commissioners reside. *Commissioners of Henderson* v. *Commissioners of Rutherford*, 657.

See CONTRACT, 7, 8.

ACTION, CRIMINAL

See INDICTMENT, 2, 3, 5.

ACTION EX DELICTO.

See ACTION CIVIL, 8.

ADVANCEMENT.

See DESCENTS, 2.

ADMINISTRATOR DE BONIS NON.

See EXECUTORS AND ADMINISTRATORS, 3, 4.

See SALE OF LAND FOR ASSETS, 2.

AGENT.

See EVIDENCE, 2, 11, 12.

EX'RS, &C.

AGREEMENT.

1. If a plaintiff has, by his promise to compromise and take less than the whole of his demand, induced any other creditor to accept a composition and discharge the defendant from further liability, he cannot afterwards enforce his claim, since it would be a fraud upon that creditor. *Hayes* v. *Davidson*, 573.

2. An agreement to accept a less sum, does not bar a demand for a greater, when there is no other consideration. *Ibid.*

3. In 1861, A, the heir-at-law of B, administered on his estate; in 1862, less than two years, A, as heir-at-law, agrees to sell certain lands belonging

to the estate of B, to C, receiving at the time the full value for it, but executed no deed for said land until the year 1864. In an action to sell this land for assets to pay B's debts: *It was held*, that although the agreement to sell in 1862, might have been defeated by B's creditors, the deed to C from A in 1864 for the same land was valid. *Donoho* v. *Patterson*, 649.

4. *Held, further*, that the Act restraining the heir from selling the land of his ancestor within two years, Rev. Code, chap. 46, sec. 61, is not a statute of limitation, which was suspended by the act of 1861, chap. 4; nor is it affected by the act of 1863, chap. 43, which provides that in computations of time for the purpose of applying any statute, limiting any action or suit, or any right or rights, or for the purpose of raising a presumption, &c., the time elapsed since the 20th day of May, which was in the year 1861, or which may elapse until the end of the war, shall be excluded from the computation. *Ibid.*

See PAYMENT, 1.

AMENDMENT.

See PLEADING, 4, 5;
" PRACTICE, 22;
" PRACTICE CRIM., 4.

APPEAL.

In an appeal to this Court, it is the duty of the appellant to cause to be prepared a concised statement of the case, embodying the instructions of the Judge as signed by him, if there be any exceptions thereto, and the requests of the counsel for instructions, if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered, the errors alleged. The appellant cannot except to the charge of the Judge on the trial below for the first time in this Court. *Sampson* v. *N. C. Railroad Co.*, 404.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY, 2;
NEW TRIAL, 5;
PROBATE COURT, 2.

ARBITRATION AND AWARD.

1. An agreement that an award shall be a rule of Court is merely an agreement to confess judgment according to the award when it shall be made. If the parties referring their matters in controversy have no suit in Court, the Court will not compel a performance of their agreement by attachment, as it will if the subject matter has been brought in Court or otherwise. *Lusk* v. *Clayton*, 184.

2. The effect of a reference to arbitrators is very different from that of a reference under the Code. Arbitrators may choose an umpire; they are not bound to find the facts separately from their conclusions of law; and their award may be general, thus "that plaintiff recover $—— and costs." *Ibid.*

ARREST OF JUDGMENT.

See PRACTICE CRIM., 1;

ASSAULT AND BATTERY.

See JUSTICES OF THE PEACE, 3.

ASSIGNEES.

See BILLS, BONDS, &C., 5, 6;
" CONTRACT, 4, 5;
" BOND TO MAKE TITLE, 1;
" EASEMENTS, 4.

ATTACHMENT.

Where judgment has been obtained in an attachment against a company upon a fraudulent demand, sued by a wrong name, and having no notice of the action, such judgment should be set aside and the company allowed to plead, although the same was known by one name as well as another. *Deep River Copper Co.* v. *Martin*, 300.

See ARBITRATION AND AWARD, 1.
" SUPREME COURT, 2.

BANKS.

See CONTRACT, 4.

BASTARDS.

See WILLS, 4.

BILLS, BONDS AND PROMISSORY NOTES.

1. The value of a promissory note, dated March, 1863, payable on demand, is the sum due upon applying the legislative scale at the time the note was made, and not when payment was demanded. *Stokes*, (*Neale*,) v. *Cowles*, 124.

2. If a statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration, (and it is immaterial whether it be illegal at common law or by statute,) and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such holder. *Glenn* v. *Farmer's Bank of N. C.*

3. Bonds issued and signed by the last Chairman of the County Court, after the adoption of the present Constitution abolishing that Court, in payment of the county's subscription to the capital stock of a railroad company made by a former Chairman according to law, which bonds were countersigned by the Clerk of that Court and sealed with the county seal, and accepted by the President of the road in payment of the

county subscription, are proper subjects of ratification, and when such bonds are ratified, they are valid. *Alexander* v. *Commissioners of McDowell*, 208.

4. When it is omitted in the Act authorizing a county to issue bonds to pay its subscription to a railroad—by whom the bonds are to be signed and issued—a succeeding Legislature has the power to amend the Act in this particular, *nunc pro tunc*, and thus render valid the action of those who issued the bonds without express authority. *Ibid.*

5. The assignee of non-negotiable or dishonored notes, (such as bank bills protested for non-payment,) takes them subject to all equities against his assignor, whether he knows of them or not. *Burroughs & Springs* v. *Bank of Charlotte*, 288.

6. A makes his note to B on the 7th of June, 1857, and on the 12th of August, 1860, C endorses on the back, "Pay the within to D," signing his name: *Held*, that C was not liable either as an endorser or guarantor, and that his indorsement merely passed the property in the note to D. *Crawford* v. *Lytle*, 385.

7. Bonds given for the loan of money to A B, to be used in purchasing a forge, at which iron was to be made for the Confederate government, of which fact A B was duly informed, cannot be recovered. *Logan* v. *Plummer*, 388.

8. The principle established in such cases is, that whenever a dollar has been expended to destroy the life of the Republic, it shall never return to the pocket of the owner. *Ibid.*

9. A sues B on a note, which he swears he obtained from C under the following circumstances; C hands the note to A, telling him to collect it if possible, and from the proceeds pay himself $800, being the amount of a note held by A against C, and pay over the balance to him, C; *Held*, that the charge of his Honor below, that if they believed the above statement of A, the plaintiff, he had such an interest in the note as entitled him to recover, was right, and the defendant was not entitled to a new trial. *Willey* v. *Gatling*, 410.

10. *Held further*, that the charge of his Honor, on the issue as to whether the note had been paid, that if they believed the defendant, they should find the note paid; but if they believed the plaintiff, they should find the note had not been paid, was unsatisfactory and improper, on account of which the defendant is entitled to a new trial. *Ibid.*

11. When a defendant offers to pay a draft within fifteen days, presented to him by an agent, who communicates the offer to the holder of the draft, and is instructed by him to grant the indulgence, which instruction is told the defendant: *Held*, that the offer was a continuing one, and that his conditional acceptance bound the defendant as if it had been done when first presented. *Wylie, Roddie & Ames* v. *Bryce*, 422.

12. Mere inadequacy of consideration, without fraud or imposition, is no defence to a suit on a bond; nor is it an objection, even when equity is invoked to enforce specific performance; and much less is it an objection when it is invoked to relieve against a contract. *Winslow* v. *Wood*, 430.

13. Where A sold a mule to B, which had a latent disease, of which it died within a week after sale without rendering any service of value: *Held*, in a suit against B, on the bond given for the mule, that the failure of consideration was no defence, and that A was entitled to recover. *Ibid.*

14. The value of a note, payable on the 1st day of January, 1866, in Confederate money, given for the hire of slaves for the year 1865, is the value of such hire for the term of hiring, although the slaves were emancipated during the time. Such contract bears interest from the 1st day of January, 1866. *Dowd* v. *N. C. R. R. Co.*, 468.

15. A bond signed by the defendant before the name of the obligee or the amount thereof is inserted, is not the deed of the defendant, and cannot be recovered, although several payments have been made thereon. *Barden* v. *Southerland*, 528.

16. The makers of a promissory note, being indebted to A, made it payable and delivered it to B and C, administrators, for the purpose that the amount of the note might be credited on a claim due their intestate from A: *Held*, , that the acceptance of the note by B and C, although they refused to credit A with the amount enured to his, A's benefit, and that he had a right to hold the makers responsible for the amount. *Overman* v. *Grier*, 693.

17. A bond payable "with interest from date, the interest to be paid annually," is due and payable from date, and does not require a demand upon the obligors for payment before suit is brought. *Knight* v. *Braswell*, 709.

18. A bond for the payment of money executed in May, 1860, by the principal and his sureties, is by the 16th section of the C. C. P. exempted from the operation of the statute of limitations, as contained in the sections 31 and 34 of the C. C. P. *Ibid.*

19. Where a bond is made payable "with interest from date, the interest to be paid annually," the interest becoming due at the end of each year is not barred by any statute of limitation that does not bar a suit on the bond itself. *Ibid.*

See COVENANT;

" SURETY, 1, 2;

" TENDER, 1, 2;

BOND.

See ABATEMENT, 1.

BOND TO MAKE TITLE.

1. A penal bond, conditioned to make title to land when the purchase money is paid, may be assigned, and an action for damages for the non-performance of the condition, brought by the real party in interest. *Utley* v. *Foy*, 303.

2. In such suit, a note given to one of the parties to induce her to perfect the title by submitting to a private examination, is not a set-off or counter-claim. *Ibid.*

See CONTRACT, 2;

" EXC'RS AND ADM'RS, 5,

BOUNDARY.

See JUDGE'S CHARGE, 3.

CASE FOR SUPREME COURT.

See APPEAL;

" PRACTICE, 19;

" PROBATE COURTS, 3.

CAVEAT EMPTOR.

See CONTRACT, 10, 11.

CERTIORARI.

See PRACTICE CIV., 8.

CHALLENGE.

See PRACTICE CRIM., 5, 7.

CHEATING BY FALSE TOKENS.

See INDICTMENT, 4.

CITIES AND TOWNS.

1. The Act of 1791, chap. 31, sec. 1, empowering the Commissioners of the City of Newbern to levy taxes, among other specific purposes, "for such other good purposes as the said Commissioners may judge necessary," and the Act of the special session of 1866, chap. 4, sec. 3, empowering the Mayor and Council of said City "by all the needful ordinances, rules and regulations, to secure order, health and quiet within the same, and for one mile around," confer on the municipal authorities sufficient power to repair and build guard houses or jails. *McLin* v. *City of Newbern*, 12.

2. The Board of Commissioners of the town of Newbern, under the act of their incorporation, and the acts amendatory thereof, have the power to build and repair a market house. *Smith* v. *City of Newbern*, 74.

3. Where a debt against a municipal corporation has been reduced to judgment in a Court of competent jurisdiction, a peremptory *mandamus* may be properly asked for, although such judgment is dormant. *Webb* v. *Town of Beaufort*, 307.

4. The Commissioners of a town, authorized to subscribe to the capital stock of a corporation, upon its being so voted by a "majority of the voters of said town qualified to vote for Commissioners," are justified in subscribing the amount voted, if a majority of the votes cast at the election, held for that purpose be in favor of such subscription, although a majority of *all* the voters of the town did not vote. *Reiger* v. *Town of Beaufort*, 319.

5. Although there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation, and although the clause to that effect in the Constitution of the United States, applies only to acts by the United States, and not to the governments of the States, yet the principle is so ground in natural equity, that it has never been denied to be a part of the law of North Carolina. *State* v. *Newsom*, 5 Ired. 50; *Davis* v. *The R. & G. Railroad Co.*, 2 Dev. and Battle, 451; *State* v. *Glenn*, 7 Jones, 321; *Cornelius* v. *Glenn*, Ib. 512. *Johnson* v. *Rankin*, 550.

6. The Act of 1863, Private Acts, chap. 47, authorizing the Commissioners of the town of Asheville to extend the streets, &c., is not unconstitutional because of the manner therein prescribed, providing compensation to the owners of the land taken or injured by extending such streets. *Ibid.*

7. A plaintiff, whose land has been taken by the Commissioner of a town for public use, waives all irregularities in the proceedings condemning such land, when he appeals from the assessment of damages by the persons appointed to assess them. *Ibid.*

8. Such appeal from the assessment of damages, carries up no other question than the amount of the compensation which the plaintiff may be entitled to; and the Commissioners are not guilty of a trespass in proceeding with their improvements pending the appeal. *Ibid.*

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. In action for the possession of personal property, under sec. 176, C. C. P., a third party claiming such property, looses his right to be made a party to the suit, after a lapse of three years from the filing his affidavit and his motion to allow him to interplead. *Clemmons* v. *Hampton*, 934.

2. Whether such claimant can appeal from an order of the presiding Judge, refusing his application to be made a party—*Quere*. *Ibid.*

See DAMAGES, 4.

CLERKS AND MASTERS.

In August, 1862, Confederate notes constituted the currency of the country. And a Clerk and Master, acting under an order of the Court to collect, is protected in receiving such money in payment of notes given for the purchase of land; and although he had no authority to invest the money and would have been liable for any loss arising from such investment, still, having invested the same in good faith in Confederate bonds, equally

as good as the currency itself, he cannot be held responsible for their loss, occurring by the results of the war. *Mabry* v. *Engelhard*, 377.

See OFFICIAL BONDS.

CLERK SUPERIOR COURT.

See EXEC'RS AND ADM'RS, 10.

" WITNESSES, 1.

COMMISSIONER.

See PRACTICE CIV., 12.

COMMISSIONS.

See SHERIFF, 1.

COMPLAINT.

See INJUNCTION, 1.

CONFEDERATE BONDS, MONEY, &c.

See BILLS, BONDS, &c., 14;

" CLERK AND MASTER;

" EXEC'RS AND ADM'RS, 2, 6;

" GUARDIAN AND WARD, 1, 5, 5;

" TENDER, 1, 2, 3, 4.

CONFESSIONS.

See EVIDENCE, 9.

CONSIDERATION.

(ILLEGAL) See BILLS, BONDS, &c., 2;

(INADEQUATE,) See BILLS, BONDS. &c, 12;

(FAILURE OF) BILLS, BONDS, &c., 13;

See CONTRACT, 9.

CONTRACT.

1. A and B in January, 1872, entered into a verbal agreement, that B should cultivate A's farm that year, A furnishing the teams and B labor; A was also to advance money during the year to pay the laborers, which advances were to be a lien on B's share of the crop, and when the crop was gathered, A was to have two-thirds thereof and B one-third. In September, B assigned to C, the plaintiff, his interest in the crop, to secure a debt, and during the same month died; A administered on B's estate, and filed a lien on his part of the crop to secure the amounts he had advanced for labor, and for gathering the crop after B's death: *Held*, that

A, the defendant, was entitled to be paid the money advanced for housing the crop; and that for the amount paid to the laborers, he was subrogated to their right of an incohate lien on the crop in preference to the claim of the plaintiff.—*McCoy* v. *Wood*, 121.

2. A sells a tract of land to B, retaining the title until the purchase money is is paid. B makes a payment on the debt due A, and then sells his interest to C; A and B agree to obtain from the proper Court a decree of sale, which is made, the land sold and is purchased by C, (the title still being retained until the purchase money is paid) who gives his bonds to A and B for their respective shares. C being unable to pay his bonds, A brings this action against the other parties, asking for a sale of the land, and the proper distribution of the purchase money; the land is sold and A becomes the purchaser, B claiming a *pro rata* share of the proceeds of sale: *Held*, that B until he paid the debt to A for the first purchase, was entitled to no part of the proceeds of sale; and further, that if the land sold for more then B owed A, B was entitled to the surplus and the surrender of his note; if it sold for less, B's note must be credited with the amount it did sell for.—*Elliott* v. *Robards*, 181.

3. When a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast on the purchaser all future risk, if nothing remains to be done to the goods, although such purchaser cannot take them away without paying the price.

   Therefore, a levy of an execution on a horse which had been sold but not delivered, as the property of the purchaser of such horse, was valid.—*Jenkins* v. *Jarrett*, 255.

4. In a suit between two banks for the recovery of $19,331, it is agreed by the debtor bank to pay one-half of said debt and interest in cash, and to satisfy, pay and discharge the balance by paying over to the other 50 *per cent.* of its assets as they are collected, and as may be sufficient therefor, the creditor bank agreeing to accept such payment and agreement as to the remainder, in "full satisfaction, payment and discharge of the suit and of all matters controverted therein or appurtenant:" *Held*, that this agreement was in effect an assignment of one-half the assets of the debtor bank, as a security for its remaining indebtedness.—*Perry* v. *Merchants Bank of Newbern, et. al.*, 309.

5. *Held further*, That such assignment not being registered, was void against a creditor of the bank making the assignment; and that the creditor acquired a lien on the choses in action assigned, as soon as the Court below condemns them to his use.—*Ibid.*

6. In an action to recover the stipulated price of certain castings, the defendant can show that the castings were not such as he contracted for, and were not suited to the purposes for which they were designed; and the jury, in their verdict, can allow the defendant the difference of value between the castings delivered and those contracted for.—*Howie* v. *Rea*, 359.

7. In such case the defendant, by receiving the castings, so that he cannot return them, does not abandon his right either to sue for a breach of contract, or to insist, in his defence, on a reduction of the price agreed to be paid.—*Ibid.*

8. Any third person, who without lawful justification, induces a party who, for a consideration, has contracted to render personal service to another, to quit such service and refuse to perform his part of the agreement, is liable to the party injured in damages.—*Haskins* v. *Royster*, 601.

9. That the consideration of a contract is too small, or its terms unreasonable, will not justify a Court, for the benefit of a third person not a party thereto, in setting such contract aside; nor is the fact that one of the contracting parties is appointed to decide as to the performance or non-performance of certain conditions, a sufficient cause for annulling and setting aside the same.—*Ibid.*

CONTRACTS.

10. In contracts for the sale of land, it is the duty of the purchaser to guard himself against defect of title, quantity, incumbrance and the like; if he fails to do so it is his own folly, for the law will not afford him a remedy for the consequence of his own negligence. *Etheridge* v. *Vernoy*, 713.

11. If, however, representations are made by the bargainor, which may be reasonably relied upon by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and they cause damage and loss to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief. *Ibid.*

See ACTIONS CIV., 1.

COUNSEL.

See PRACTICE CRIM., 3;
" WITNESSES, 2, 3.

COUNTER CLAIM.

A claim for services alleged to be illegal, when once adjusted and allowed by the parties in a settlement, cannot be set aside for its alleged illegality, when presented by defendant as a set-off to the demand of the plaintiff's assignee. *Lusk* v. *Patton*, 701.

See BOND TO MAKE TITLE, 2.

COUNTIES.

Where a plaintiff holds a debt against a county, contracted since the adoption of the Constitution, for the ordinary and necessary expenses of the county, and where the county has the means to pay the debt, such plaintiff is entitled to a peremptory *mandamus*, and it was error in the Court below to refuse it. *Uzzle* v. *Commissioners of Franklin*, 564.

(SUBSCRIPTION BY) See BILLS, BONDS, &C., 3, 4.

COUNTY COURT.

See BILLS, BONDS, &C., 3;
" CO. COMMISSIONERS, 1.

COUNTY COMMISSIONERS.

1. When a matter is voluntarily settled by the act of the partes, in the absence of fraud or mistake, it must be deemed settled forever.

Therefore, Where the County Court of a county, in the year 1862, appointed an agent to borrow money and purchase salt for the families of soldiers then in the Confederate army, and in 1867 ordered the agent to pay to the person from whom the money was borrowed a certain sum, which was done, the Board of Commissioners of such a county cannot recover back the money so paid by the agent. *Commissioners of Catawba* v. *Setzer*, 426.

2. In an action against the Board of Commissioners of one county, brought to the Superior Court of an adjoining county, objection to the *venue* must be taken in that Court; otherwise the objection will be considered as waived. *Edwards* v. *Commissioners of Wilkes*, 571.

3. A creditor of a county cannot be compelled either by the Legislature or by the Board of Commissioners to "bond" his debt and wait five years for its ultimate satisfaction; such creditor is entitled to a peremptory *mandamus*. *Ibid.*

4. When a few of a class are permitted to sue for a whole class, and especially when permitted to sue for the public, they will not be allowed technical advantages which involve a breach of faith. *Street* v. *Commissioners of Craven*, 644.

5. *Therefore*, it is no good defence to a suit on the bonds issued to pay for stock subscribed for by a county in a certain railroad, that the agent authorized to make such subscription, instead of subscribing for the stock himself, purchased the same from a third person. *Ibid.*

6. Nor is it a valid defence that the county issued its own bonds to pay such subscription instead of negotiating a loan, as empowed to do by the Act. *Ibid.*

7. When by the Act authorizing a county to subscribe for stock in a railroad, it is provided that such county may "levy such taxes annually as may be sufficient to pay the amount of such loan and interest thereon," the Board of Commissioners of the county have the power to lay a tax of $2 on every $100 of property. *Ibid.*

8. Equity will enjoin no one to make an iniquitous defence: *Therefore*, a Board of County Commissioners are not compelled to plead the statute of limitations, even when such plea would be a valid defence. *Ibid.*

See ACTIONS Civ., 9;

" TAXES, 2, 3.

COURTS OF EQUITY.

See JURISDICTION, 1;

" PRACTICE, 13.

COVENANT.

A enters into a covenant to purchase of B certain lands, at the price of $2,500, to be paid by the surrender to B of a note held by A against him

for $1,700, payable in specie or its equivalent, and A promising to pay (or secure) the balance of the purchase money for the land to C: *Held*, that A was not entitled to any premium on the note for $1,700 agreed to be surrendered, as by the agreement to surrender, the value of that note as well as the price of the land was determined by the parties.—*Jarratt* v. *Wilson*, 401.

See EASEMENT, 3.

CREDITORS.

See AGREEMENT, 3.

CREDITOR'S BILL.

See EXECUTORS AND ADMINISTRATORS, 15, 16.

CROP.

See CONTRACT, 1.

DAMAGES.

1. In a suit for damages, for an injury to plaintiff's land by ponding water upon it, the defence relied on being an easement by prescription to pond water back by the erection of a new dam in place of an old one, and the plaintiff replying to such defence, that the new dam was higher and tighter than the old one, and that thus the easement was exceeded: *Held*, that the issue submitted to the jury as to the height of the new dam, and as to whether from such height over the height of the old dam the plaintiff was endamaged, are not sufficiently responsive to the allegation and denial in complaint and answer, and that the jury should find, whether or not the defendant has exceeded his easement, and ponded water back further than he had a right to do by prescription.—*Jenkins* v. *Conley*, 353.

2. Plaintiff going to defendant's warehouse after goods, stops his wagon on a track nearest the platform, and next to the main track, over which the mail train passes, so near thereto as to be in the way of the engine: *Held*, in a suit to recover damages for the destruction of his wagon by the engine, that his loss is the result of his own negligence, and that he had no right to recover.—*Murphy* v. *Wilmington and Weldon Railroad Company*, 437.

3. The value of property taken under process, should be assessed at the time of trial, as the taker should have the option of returning the property so taken, or of paying its assessed value. If the price of the property taken has fallen in the time, the jury should include the difference in their assessment of damages for the detention.—*Boylston Insurance Co.* v. *Davis*, 485.

See CITIES AND TOWNS, 78.
" CONTRACT, 6.
" OFFICERS, 1, 2.
" PRACTICE CIVIL, 21.

DECEIT.

See ACTIONS, CIVIL, 8.

DECLARATIONS.

See EVIDENCE, 2, 5, 10, 14.

DEEDS.

1. To take the acknowledgment and private examination of a *feme covert* to a deed conveying her land is a judicial act, and when duly taken, the deed so acknowledged is an assurance of record, like a *fine* in England.—*Paul* v. *Carpenter*, 502.

2. An acknowledgment and private examination taken by the Provost Marshal of the city of Newbern, while that place was in possession of the United States military authorities, in the absence of fraud and the like, is good, having a similar effect with foreign judgments.—*Ibid.*

See JUDGES CHARGE, 3.
" PLEADING, 6.

DEED IN TRUST.

Since the statute of 1829, deeds in trust and mortgages, are of no validity whatever, as against purchasers for value and creditors, until they are registered; and they take effect only from and after the registration.

No notice, however full and formal, will supply the place of registration.—*Robinson* v. *Willoughby*, 359.

DEMAND.

See ACTIONS, CIVIL, 7.

DEMURRER.

See ACTIONS, CIVIL, 1.

DESCENTS.

1. A died seized and possessed of real and personal estate, leaving him surviving three grand-children by a son and five by a daughter—the son and daughter having died before A: *Held*, that under rule 3, Bat. Rev. chap. 36, the grand-children represent their ancestors, and take the estate *per stirpes* and not *per capita*.—*Crump* v. *Faucett*, 343.

2. And as the parties take by representation, it follows that any advancements made to the ancestors must be accounted for.—*Ibid.*

DILIGENCE.

See EXECUTORS AND ADMINISTRATORS, 1, 2.
" GUARDIAN AND WARD, 3.

DISTRIBUTEES AND DISTRIBUTION.

See EXECUTORS, &c., 13, 14.
" DESCENTS, 1.
" PROBATE COURTS, 4.

DOWER.

See SALE OF LANDS FOR ASSETS, 1.

DRAINING WET LANDS.

See EASEMENTS, 1, 2.

EASEMENTS.

1. When upon the petition of one or more parties, under the Act of 1793, (Rev. Stat. chap. 40,) leave was granted by the County Court to cut a canal across the land of another for the purposes of drainage, the petitioners and their assignees, upon the report of the jury provided for in said act being confirmed, acquire not merely an easement but title in fee to the land condemned.—*Norfleet* v. *Cromwell*, 634.
2. The right of the State to condemn land for drains rests on the same foundation as its right in cases of public roads, mills, railroads, schoolhouses, &c. The Acts granting such powers are not unconstitutional.—*Ibid.*
3. Where a covenant is not to be performed on the land, but concerns it, the covenant will be enforced against an assignee of the covenantor with notice.—*Ibid.*
4. If the party from whom an assignee purchases cannot complain of an alleged misuser of an easement, the assignee cannot, as he stands in the shoes of him from whom he purchased.—*Ibid.*

See DAMAGES, 1.

EJECTMENT.

1. An action of Ejectment does not abate by the death of the lessor of the plaintiff, and there is no necessity to make the heirs of the lessor parties to the suit, except to make such heirs liable for costs, the supposed lease being in no way affected by the lessor's death.—*McLennan* v. *McLeod*, 364.
2. In the old action of Ejectment, the fiction of a "lease, entry and ouster," was adopted merely for the sake of saving the trouble and expense of making a lease and entry; therefore, no lease can be set out in the declaration, which could not have been made at the time the action was commenced.—*Ibid.*

ELECTION.

See PAYMENT, 2, 3.

EQUATION OF TAXATION.

See TAXES, 2, 3.

ERROR.

See PRACTICE, 14.

ESCHEAT.

See WILLS, 4.

ESTOPPEL.

See AGREEMENT, 2;

" SHERIFF'S SALE, 3.

EVIDENCE.

1. In an action, brought to subject certain lands (purchased by defendant,) to the operation of an alleged verbal trust, to set up which it is material that all of certain parties contributed to the payment of the debt charged upon the land, evidence tending to show that one of such parties paid nothing towards said debt, and claimed no interest in the land, is material and admissible, and that his Honor erred in excluding it on the trial below. *Taylor* v. *Dudley*, 146.

2. What an agent says or does, within the scope of his agency, and while engaged in the very business, is evidence for or against his principal. His declarations made subsequently as to what he had done, is not evidence, though he may continue still to act as agent generally, or in other matters. *McComb & Wallace* v. *The N. C. Railroad Co.*, 178.

3. The rule that when two witnesses of equal credibility swear affirmatively and negatively as to a certain issue, credit is given to be the affirmative statement in preference to the negative, is not a rule of law to be be laid down by the Court, and it was no error in the Judge to refuse so to charge. *Glenn* v. *Farmer's Bank of N. C.*, 191.

4. When a party to a suit, who is *in interest* really a plaintiff, but appears as a party defendant, gives evidence as to a transaction with a deceased testator, it renders competent the evidence of a co-defendant, touching the same transaction as provided for by sec. 343, C. C. P. *Redman* v. *Redman*, 257.

5. If the declaration of a testator made in his lifetime, not in the presence of the defendant, could not be given in evidence, because of his not being permitted to make evidence for himself, his administrator will not be allowed to prove such declarations after his death. *Ibid.*

6. The entries on the record, that certain exceptions were to be "passed upon by the Court, as of this term, followed by the judgment of the Court, are conclusive of the waiver of a jury trial by the parties, and cannot be impeached. *Maxwell* v. *Maxwell*, 267.

7. A plaintiff being examined in his own behalf, and swearing that the defendant promised to pay a certain debt, the defendant swearing that he made no such promise, both witnesses being of equal credibility, is not entitled to have the jury charged by the Court, that as a rule of evidence, the positive testimony was entitled to *more* weight than the negative testimony. *Smith* v. *McIlwaine*, 287.

8. Such rule is subject to so many exceptions, as not to be of much practical use; and if carelessly administered, may work much mischief. *Ibid.*

9. The prosecutor, a white man, the employer of the defendant, a colored man, goes to the field where the defendant is at work, with two other white men, and tells him that he has lost a hog, at the time saying "I believe you are guilty—if you are, you had better say so; if you are not, you had better say that," and the defendant confesses his guilt: *Held*, that the confession was made under the influence of hope or fear or both, and under the circumstances was inadmissible. *State* v. *Whitfield*, 356.

10. The acts and declarations of a vendor, while in possession of the property sold, are competent, both to prove the fact of possession and control, and to qualify the extent and purpose of the possession. *Kirby* v. *Masten*, 540.

11. Evidence of what an agent said in regard to a transaction already passed, but while his agency for similar objects still continued, is not admissible to prove the contract itself, although it is competent to contradict the statement of the agent that no such contract was made. *Stenhouse & McCauley* v. *Char. Col. & Augusta Railroad Co.*, 542.

12. If such evidence is, after objection, received generally, without confining it to the contradiction of the statement of the agent, it is error, and entitles the party objecting to its reception to a new trial. *Ibid.*

13. The deed from a sheriff to the purchaser of land sold under a *ven. ex.*, is evidence on a question of title, notwithstanding there is endorsed on such *ven. ex.* a memorandum that there was "no sale for want of compliance." *Maynard* v. *Moore*, 546.

14. A sues B for assisting C to remove from the State, alleging such removal to have been for the purpose of defrauding C's creditors, of whom A was one; the declaration of C, contained in a letter to A is not evidence against B, unless the complicity of B and C be established *aliunde*, and such declarations cannot be received to prove such complicity. *Bryce* v. *Butler*, 585.

15. Because the presiding Judge, after objection, permitted the plaintiff to read the body of a letter which was unimportant and irrelevant, is no reason that he should permit the reading of the postscript, which was relevant, upon the ground that when *part* of a declaration is received as evidence, the party is entitled to have the *whole* thereof go to the jury. *Ibid.*

See EXEC'RS AND ADM'RS, 3;

" GUARDIAN AND WARD, 6; 7;

" NEGLIGENCE, 1, 2;

" PAYMENT, 1,

" ROADS, 1.

EXCEPTIONS.

See APPEAL;

" PRACTICE, 3, 4, 17.

EXECUTIONS.

1. Where an execution issued from the County Court in 1861, and regularly thereafter until the Spring Term, 1867, of the Superior Court, to which Court it was transferred under the ordinance of the 23d of June, 1866, but no motion made at said Spring Term, 1867, to docket in the Superior Court, and the same was not re-issued until December (Special) Term, 1867, such execution lost its lien on the land levied upon, and a sale of the land by virtue thereof, conveyed no title.—*Brem* v. *Jamieson*, 566.

2. Where the name of one or more of the defendants is omitted in an *alias* execution, regularly issued before that time and levied on the land of such defendant, the omission is fatal, and a sale of the land under such execution is invalid.—*Ibid.*

See CONTRACT, 3;

" JUDGMENT.

" SHERIFF, 1, 3;

" SHERIFF'S SALE, 1, 3, 4;

" SUPERIOR COURTS.

EXECUTORS AND ADMINISTRATORS.

1. That a defendant, an administrator, did not attempt to collect a debt for more than eighteen months after it fell due, does not warrant the legal inference of a want of due diligence on his part, without a finding of the further fact, that the obligors were men in failing circumstances, so as to call for active diligence in the collection, or that the condition of the estate required immediate collection, in order to pay off pressing demands and save costs.—*Keener* v. *Finger*, 35.

2. Nor does it amount to a want of due diligence, that the defendant caused a levy to be held up for three years after judgment, and then directed the execution to one of the defendants therein, which was not kept up and perfected as a lien, unless it is also found that it was for the interest of the trust fund, that the debt should have been collected in 1863-'64, in Confederate money, or else that the circumstances were such that the defendant should have taken upon himself the odium of demanding specie, or that the defendant in the exercise of due diligence, should have foreseen the fact that at the close of the war there was to be a military order forbidding the collection of old debts contracted for the purchase of slaves.—*Ibid.*

3. A privity exists between an administrator *de bonis non* and the first administrator, as well in the case of plaintiff, as of defendants, so that the former succeeds to all the rights of the intestate, in respect to personal property, which the first had not fully administered; and a judgment against the first administrator, is conclusive evidence against the administrator *de bonis non*, in an action to renew it.—*Thompson* v. *Badham*, 141.

4. Such judgment may, however, be impeached for fraud by the administrator *de bonis non*, either by motion in the cause, or by answer to plaintiff's action to revive it.—*Ibid.*

5. An intestate sells B a tract of land for $800, putting him in possession and giving him a bond to make title when the purchase money is paid; B pays part and refuses to pay the balance of the purchase money. A, the administrator, sues B, demanding 1st, a rescission of the contract; 2d, a writ of possession; and 3d, damages: *Held*, that he is entitled to neither, but that he was entitled to a judgment for the unpaid balance, and to a sale of the land, if such judgment is not satisfied.—*Mitchell* v. *Wood*, 297.

6. An Executor had no right, in the Fall of 1868, to collect good notes belonging to his testator's estate, and invest the proceeds in Confederate bonds.—*Bell* v. *King*, 330.

7. The irregularity of bringing a suit against an Administrator for the settlement of his intestate's estate, in the Superior Court at term time, instead of in the Probate Court, is cured by secs. 425, 426, chap. 17, Bat. Rev.—*Herring* v. *Outlaw*, 334.

8. In a suit to recover a distributive share in an intestate's estate, it is not necessary to prove that the person paying such share to the agent of the distributee was, at the time, rightful Administrator; and evidence to prove that such person paid the distributee's share to the agent, is clearly admissible.—*Neighbors* v. *Jordan*, 406.

9. It is against the policy of the law to allow an Administrator to buy at his own sale. And when he does so, those interested have their election to treat the sale as a nullity and set it aside, or to let the sale stand and demand a full price.—*Fronsburger* v. *Lewis*, 456.

10. Section 73, chap. 45, Bat. Rev., gives to Clerks of the Superior Courts jurisdiction of debts against the estate of deceased persons.—*Jenkins* v. *Carter*, 500.

11. Docketed judgments in force against the estate of a decedent, has priority of payment over other debts to the extent of the lien which such judgment has on the real estate. If the real estate is more than enough to pay the judgment, then the whole thereof has priority over other debts; if the real estate is only sufficient to pay part of the judgment, then the priority is measured by the value of such real estate.—*Ibid.*

12. A surety to an administration bond who paid one-half of a debt recovered against the insolvent administrator, is not subrogated to the rights of the *creditor* whose debt he paid, but to the rights of the *administrator* for whom he paid it. *Clarke* v. *Williams*, 679.

13. An administrator, against whom a judgment was recovered after he had turned over the property of his intestate to the distributees, has the right to recover from them, each their ratable part of such debt, when it appears that the intestate was only surety to the debt recovered, and that at the time he delivered the property to the distributees the principal in the debt was solvent and able to pay the same, and was rendered insolvent by the manumission of his slaves. *Ibid.*

14. In such case, the distributees will contribute each their ratable part and no more, the solvent ones not having to pay the parts of the insolvent. *Ibid.*

15. In a creditor's bill against an administrator, when it is found upon a reference to ascertain the debts, that the fund is sufficient to pay such debts, a judgment against the administrator, on the admission of the debt, is taken as full proof; for the reason that the other creditors are not interested in the matter. *Overman* v. *Grier*, 693.

16. On the contrary, when the fund is not sufficient to pay the debts, each creditor is allowed to dispute the debt of any other, and the debt of such other creditor must be proved *de novo* before the referee; for in such case the creditors have a direct interest in the question, debt or no debt, inasmuch as its allowance will diminish the fund *pro tanto*. *Ibid.*

17. Where an executor is authorized to sell the lands of his testator in his discretion, this Court will not interfere by entertaining an application for a license to sell. Such an executor may be compelled to sell, when third persons have a right to compel him to do so; and the Court will restrain abuse of his discretion. *Hinton* v. *Hinton*, 730.

See AGREEMENT, 3;
" BILLS, BONDS, &c., 16;
" CONTRACT, 1;
" PRACTICE CIVIL, 16;
" SALE OF LAND FOR ASSETS, 1;
" SUPERIOR COURTS, 2.

EXEMPTION.

See ROADS, 2.

FEES.

See ACTIONS CIV.., 6;
" SHERIFF, 4.

FIXTURES.

When the owner of the inheritance attaches to the freehold articles of personalty for the better enjoyment of the estate, such articles become a part of the realty, and pass to the heir, mortgagee or vendee. *Latham* v. *Blakely*, 368.

FORCIBLE ENTRY AND DETAINER.

See JUSTICES OF THE PEACE, 1, 5.

FORCIBLE TRESPASS.

1. To constitute the offence of Forcible Trespass, there must be a "demonstration of force," such as is calculated to intimidate or put in fear—the law not allowing its aid to be invoked by indictment for rudeness of language, or even slight demonstration of force, against which ordinary firmness will be sufficient protection. *State* v. *Painter*, 71.

2 An indictment under the act of 1866, chap. 60, in which it is charged, that the defendant did unlawfully enter upon the premises of the prosecutor, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, &c., is sufficient. *State* v. *Whitehurst*, 85.

See JUSTICES OF THE PEACE, 2.

FRAUDS.

See AGREEMENT, 1;

" ATTACHMENT;

" EXECUTORS AND ADMINISTRATORS, 4;

" NOTICE;

" SHERIFF'S SALE.

GUARDIAN AND WARD.

1. Confederate money, taken in good faith, should be received at its scaled value, in all fiduciary transactions: *Therefore*, a guardian who paid the taxes due from his ward's estate, with his own Confederate money, can only receive credit for the value thereof according to the Legislative scale. *State ex rel. Cox* v. *Peebles*, 10.

2. Good faith requires that any profit which arises from a transaction of the guardian in the management of the ward's estate, must be for the benefit of the ward, and not of the guardian. *Ibid.*

3. A defendant, in the exercise of due diligence, in collecting a bond due a ward, is not required to foresee the fact, that under the construction given to the homestead law, it would be held to apply to pre-existing debts; nor the fact that a levy before the adoption of the Constitution would hold good, notwithstanding the provisions of such law. *Wells* v. *Sluder*, 55.

4. A party who at first refuses to receive Confederate money in payment of a debt due a ward, is afterwards prevailed upon so to do, by the declarations of the obligor, yields to a groundless fear, and is liable to the ward for the amount so received. *Ibid.*

5. A guardian who, in 1862, exchanged North Carolina six *per cent.* bonds for North Carolina eights, when his wards were full of age, and afterwards received the semi-annual interest on such bonds, and gave the guardian their receipt for the same when the bonds were turned over to to them, is not responsible for the same, though they were lost by the results of the war. *Pearson* v. *Caldwell*, 291.

6. In a suit on a guardian bond, evidence, that the court house of the county in which the bond was taken was burned with many official papers in 1862, and that search had been made among the papers of a deceased person who was Clerk at the time of burning, and who was in the habit of keeping some of the official papers at his residence, and that no bond given by the guardian of the plaintiff had been found,

was held sufficient to authorize the introductory of secondary evidence of the execution and contents of the bonds declared on. *Harriel* v. *Hare*, 658.

7. A certified copy of the extracts from the records of the County Court, that at August Term, 1850, the guardian of the plaintiff and other minors, renewed his bond by entering into another bond in the sum of $3,000 with the present defendant and another as his sureties, is competent evidence to prove the existence and due execution of the bond declared upon; and a certified copy of the guardian's return is also competent as tending to establish the amount due at the date of the return. *Ibid.*

8. An action against a guardian for an account and settlement with his ward, should commence in the Probate Court; the mistake in the jurisdiction, (as an irregularity,) is cured either by waiver, as when defendant answers the complaint, or otherwise pleads to the merits, or by the merits, or by the operation of remedial statutes. *Clodfelter* v. *Bost*, 733.

9. When the defendant in 1854 took the guardianship of the plaintiff, who as heir of a soldier killed in the Mexican war, was entitled to a pension from the U. S. Government, which facts within the knowledge of the guardian were sufficient to put him on enquiry as to such pension, and where the guardian had been remiss in other duties: *Held*, that he was responsible for such pension from 1854 until his ward became of age. *Ibid.*

HEIR AT LAW.

See AGREEMENT, 3, 4;

" FIXTURES;

" PLEADING, 6.

HUSBAND AND WIFE.

1. The doctrine of years ago, that a husband had the right to whip his wife, *provided*, he used a switch no larger than his thumb, no longer governs the decisions of our Courts; and the opinion, more in accordance with our present civilization, that a husband has no legal right to chastise his wife under any circumstances, prevails.—*State* v. *Oliver*, 60.

2. To entitle a husband to an estate as tenant by the curtesy, before the adoption of the Rev. Code (1st January, 1856,) a seizen in deed was necessary; and under the rules prescribed in chap. 38 of the Rev. Stat., (1st January, 1838,) a seizen in deed was also necessary, in case of the parent's claiming a life estate upon the death of his child. Now under the provisions of the Rev. Code, chap. 38, rules 1 and 13, neither actual nor legal seizen is necessary to make the stock in the devolution of estates. *Sears* v. *McBride*, 152.

3. At common law, neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is founded "upon decency, morality and public policy," it is not changed by chap. 43, sec. 15, Bat. Rev., (C. C. P., sec. 340,) allowing parties to testify in their own behalf.—*Boykin* v. *Boykin*, 262.

4. Where there was an agreement between a husband and wife that if the wife would join him in a conveyance of a certain tract of land descended to the wife from her father, she should have another tract in lieu of the one so conveyed: *Held*, that when the husband received the money for the land conveyed as before set out, he held it upon trust for his wife, and that his estate became responsible therefor.—*Dula* v. *Young*, 450.

5. *Held further*, that the heirs at law of the wife are entitled to the land agreed to be substituted for that of the wife, free from the incumbrance of the husband's debts.—*Ibid.*

INDICTMENT.

1. It is not necessary to constitute a riot, that the facts charged should amount to a distinct and substantative indictable offense; it is sufficient, if such facts shall constitute an attempt to commit an act of violence which, if completed, would be an indictable offence. *State* v. *York et al.*, 66.

2. An indictment, in which it is charged that the defendant "did profanely curse and swear, and take the name of Almighty God in vain," &c., "to the common nuisance," &c., charges no offence, and cannot be sustained. *State* v. *Powell*, 67.

3. In an indictment under the 95th section of chapter 32 of Bat. Rev., the charge that the defendants "unlawfully and wilfully did kill, injure and abuse one cow, one heifer, the property," &c., "which said cow and heifer were then and there in an inclousure, not then and there surrounded by a lawful and sufficient fence," is sufficient. *State* v. *Painter*, 70.

4. The defendant sold to the prosecutor four barrels of crude turpentine, representing "that they were all right, just as good at bottom as they were at top," &c., and when examined the barrels contained only a small quantity of turpentine on the top of each, the rest of the contents being chips and dirt: *Held*, that the defendant was guilty of cheating by false tokens. *State* v. *Jones*, 75.

5. An indictment to be good, must set forth with plainness and certainty, all the essential facts constituting the offence; the charge must be explicit enough to support itself, for if all the facts alleged in the indictment may be true and yet constitute no offence, the indictment is insufficient. *State* v. *Eason*, 88.

6 To an indictment for injuring a public school house, the defendants, for a defence, set up a claim in a third person to the house alleged to be injured, and justified the permission of such claimant, to commit the acts complained of: *Held*, that the charge of the Judge below, "If the jury believed the defendants honestly were of the belief that the house was the property of" such claimant, "and he had a right to give it to them, they were not guilty; but if the defendants did the acts complained of, willing to run the risk of a suit, or careless whether they had a right or not, that would not protect them, they would be guilty," was as favorable as the defendants could ask, and was no good ground for a new trial. *State* v. *Roseman & Trexler*, 235.

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7. A defendant cannot be convicted of that which he is not charged. *Therefore*, where the Judge below, upon the trial of an indictment, charging the defendant with breaking and entering into the house of the prosecutor and stealing therefrom, charged the jury "that if they believed, the defendants, (however they may have got into the house,) broke out of it, they were guilty:" *It was held*, to be error, and to entitle the new defendants to a new trial. *State* v. *McPherson & Williams*, 239.

8. In an indictment containing two counts, one for larceny and the other for receiving stolen goods, the jury may bring in a general verdict of guilty, the grade of punishment being the same for each offence. *State* v. *Baker*, 530.

See PERJURY.

INJURY TO A SCHOOL HOUSE.

See SUPRA, 6.

INJUNCTION.

1. When the allegations in the complaint upon which it is sought to set up injunctive relief, are fully met by the answer, the restraining order first issued will be set aside, and an injunction until the hearing refused.—*Woodfin* v. *Beach*, 455.

2. When the dissolution of an injunction would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the Court, whether the equity of the complaint be sufficiently negatived by the answer, the Court will not dissolve the injunction but continue it to the hearing.—*Lowe* v. *Commissioners of Davidson*, 582.

INTEREST.

The rule for computing interest on a bond given in South Carolina, is to calculate the interest upon the principal for the first year, setting the interest aside, and then for the second, third and so on until the time for the first payment. Then calculate the interest on each year's interest to the same time, and apply the payment first to the extinguishment of this interest, and the surplus, if any, to a reduction of the principal. If the payment is not sufficient to pay this interest, first extinguish the interest calculated on each year's interest, and apply the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest, it is set aside, and neither stops nor bears interest. *Bratton* v. *Allison*, 493. (See Memoranda, 739.)

See BILLS, BONDS, &c., 17, 19;

" TENDER, 1, 2, 3, 4.

JUDGE OF THE SUPERIOR COURT.

See ABATEMENT, 2;

" PRCTICE CIV., 13, 20, 22;

" PRACTICE CRIM., 2, 3.

JUDGES CHARGE.

1. It is prejudicial to the rights of the plaintiffs, for the presiding Judge on the trial below, to charge the jury that "the plaintiffs are not entitled to recover in any event, and if the issues were found in their favor, he would set aside the verdict," and afterwards to submit the issues to be passed upon by the jury to "say how the matter was." *Dula* v. *Young*, 450.

2. When on the joint trial of two prisoners for murder, the presiding Judge directs the acquittal of one, remarking at the time: "I shall direct an acquittal as to him, although I think it not improbable that he was there," the other prisoner not being in any manner prejudiced by such remark, has no right to complain and is not entitled to a new trial. *State* v. *Martin*, 628.

3. What are the termini or the boundary of a grant or deed is a matter of law; where these termini are is a matter of fact for the jury. Therefore, where there was evidence tending to establish a certain corner at a particular place, it was error in the presiding Judge to say, as a conclusion of law, the corner was at a different place. *Clark* v. *Wagoner*, 706.

See BILLS, BONDS, &c., 9, 10;
" DAMAGES, 1;
" EVIDENCE, 1, 15;
" INDICTMENT, 6, 7;
" LARCENY, 1;
" NEW TRIAL;
" PRACTICE, 15.

JUDGMENT.

The lien on land acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days notice before the day of sale by the sheriff, and the plaintiff so notified shall fail to take out execution and put it into the sheriff's hands before the day of sale. Rule 19, 63 N. C. Rep. 669. *Dougherty* v. *Logan*, 558.

See EXECUTORS AND ADMINISTRATORS, 3, 4, 5, 11, 13, 15.

JURISDICTION.

1. The jurisdiction conferred on our former Courts of Equity by the ordinance of the 23d of June, 1866, in favor of creditors following assets into the hands of fraudulent alienees, is concurrent with that given to Courts of Law by chap. 46, secs. 44, *et seq.* of the Rev. Code. *Humphrey* v. *Wade*, 280.

2. Statutes which merely give affirmatively jurisdiction to one Court, do not oust that previously existing in another Court. *Ibid.*

See EXECUTORS, &c., 7, 10;
" GUARDIAN, &c., 8.
" JUSTICES OF THE PEACE, 4.
" PROBATE COURTS, 4;
" SUPERIOR COURTS, 2, 3.

JURY.

See NEW TRIAL, 6.

JUSTICES OF THE PEACE.

1. The distribution of judicial powers by Art. IV of the Constitution, is a virtual repeal of all laws giving jurisdiction to Justices of the Peace in case of Forcible Entry and Detainer, except for the binding of trespassers to the Superior Court to answer a criminal charge.

2. *Therefore*, where four or more men enter upon premises in the actual possession of another, by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. *State* v. *Yarborough*, 250.

3. The Act of 1868–'69, chap. 178, by which Justices of the Peace were given jurisdiction finally to try certain petty assaults under certain circumstances, was repealed by the act of 1870–'71, chap. 43, which says that in all cases of assault the punishment may be by fine or imprisonment, or both, at the discretion of the Court. *State* v. *Heidelburg*, 496.

4. The Constitution, Art. IV, Sec. 33, gives Justices jurisdiction of criminal matters arising in their counties when the punishment *cannot* exceed a fine of fifty dollars, or imprisonment for one month. When the Legislature removed this limitation and left it discretionary with the Court to exceed that limit, it took away the jurisdiction of Justices of the Peace over the offence. *Ibid.*

5. A Justice of the Peace has no jurisdiction of proceedings of Forcible Entry and Detainer under Rev. Code, chap. 49. *At., Ten. & O. Railroad Co.* v. *Sharpe*, 509.

LABORER.

See CONTRACT, 8.

LABORER'S LIEN.

The lien of a laborer, who commenced work in January, 1873, attaching by virtue of the provisions of the Act of 1868–'69, chap. 206, sec. 9, is not divested in favor of the lien created by the act of 1872–'73, chap. 133, sec. 1, ratified 1st March, 1873, as that would be impairing a vested right, as well as the obligation of a contract. *Warren* v. *Woodard*, 382.

See CONTRACT, 1.

LARCENY.

1. Larceny may be committed in a crowd or in the public streets; and where the defendant obtained possession of a hog from a stranger, claiming it as his own, and carried the hog home, altered the mark and put it in his pen with the other hogs: *Held*, it to be no error in the Judge below, to leave it to the jury to say, whether the taking was done for the purpose of depriving the real owner of his property, and converting the same to

his own use or not; and if so done, the defendant was guilty. *State* v. *Fisher*, 78.

2. In an indictment for larceny, the ownership of the property stolen is charged "100 lbs. of cotton, the property of C, 100 lbs. of cotton, the property of G:" *Held*, that the objection to the indictment on account of duplicity and obscurity, would have been fatal on a motion to quash, but that the defect is cured by verdict, as provided in chap. 35, secs. 15 and 20, Rev. Code. *State* v. *Simons*, 348.

See INDICTMENT, 8.

LEASE, ENTRY AND OUSTER.

See EJECTMENT, 2.

LEGACIES.

See SALE OF LAND FOR ASSETS, 2;
" WILLS, 1, 2, 4.

LEGISLATIVE SCALE.

See BILLS, BONDS, &c.;
" PRACTICE CIV., 11.

LIFE ESTATE.

See WILLS, 3.

LIMITATIONS, STATUTE OF

1. In action on an account due 1st January, 1861, to which the statute of limitations is pleaded, the time during which the statute is to run, must be computed from the said 1st day of January, to the 20th day of May, 1861, and then from the 1st day of January, 1870, till the day the summons was issued. *Williams* *Williams*, 189.

2 Where the defendants, deriving title under a grant, dated in 1816, claimed up to a line from one point to another, (which line was established and agreed to by all parties,) exercising ownership by open and notorious acts, acknowledged and acquiesced in by those now claiming adversely, since the date of the grant in 1816, the plaintiff's claim to the *locus in quo* extending to said line, is barred by the statute of limitations. *Clark* v. *Wagoner*, 706.

See AGREEMENT, 3, 4;
" BILLS, BONDS, &c., 18,
" COUNTY COMM'RS, 8.

LOANS.

See ACTIONS CIV., 3;
" BILLS, BONDS, &c., 7.

MANDAMUS.

See ACTIONS, CIV., 4;

" CITIES AND TOWNS, 3;

" COUNTIES;

" COUNTY COMM'RS, 3.

MINORS.

1. Necessaries for which an infant may become liable, not only includes such articles as are absolutely necessary to support life, but also those that are suitable to the state, station and degree of life of the person, to which they are furnished. *Jordan* v. *Coffield & Wife*, 110.

2. The plaintiff, a merchant, furnished the *feme* defendant during her infancy and just before her marriage, with certain articles, among which was her bridal outfit, and a chamber set: *Held*, that it was not error in the Judge below to charge the jury, if they believed that the articles furnished, were actually necessary and of a fair and reasonable price, the plaintiff was entitled to recover. *Ibid.*

3. The obligation of the mother is not the same as that of the father to support infant children; and the weight of authority, both in this country and in England, is against the liability of the mother to this burden, except under peculiar circumstances. *Ibid.*

MORTGAGE.

See DEEDS OF TRUST.

NECESSARIES.

See MINORS, 1, 2, 3.

NEGLIGENCE.

1. Plaintiff sent his cotton to defendants' gin house to be ginned; while there, the gin with all the cotton in it was consumed, it not appearing how the fire originated: *Held*, that the destruction of the cotton by fire was not *prima facie* evidence of negligence; and further, it being shown that the defendants, during the possession of the plaintiff's cotton used ordinary care, they are not liable for its loss.—*Bryan* v. *Fowler*, 506.

2. Where the plaintiff's horse was in his pasture, through which the defendant's road ran, and was run over in the day time by one of the engines of defendant, it appearing on the trial that the horse, before being struck, ran some two hundred yards on the track, and that there was nothing to prevent the engineer from seeing him, and that no alarm was given by the engineer until about the time the horse was run over; *Held*, that there was such negligence on the part of the engineer as would make the defendant liable in damages for the injury to the horse.—*Jones* v. *N. C. Railroad Co.*, 626.

See DAMAGES, 2;

" NEW TRIAL, 1.

NEWBERN, CITY OF

See CITIES AND TOWNS, 1, 2.

NEW TRIAL.

1. In an action against a Sheriff for negligence and not using due diligence in endeavoring to collect a judgment, the execution on which had been regularly placed in his hands, the defence being that the execution was held up by direction of the plaintiff; and on the trial, the jury find all issues in favor of the defendant: *Held*, that it was no ground for a new trial, that the jury failed to give the plaintiff nominal damages, under the instruction of the Court.—*Foust* v. *Stafford*, 115.

2. The refusal of the Judge below to consolidate several actions brought to recover the amount of certain bills issued by a Bank, the defendant, where it did not appear that the bills sued on were all of like character, and emitted under the same circumstances, was right, and the defendant was not entitled to a new trial on account of such refusal.—*Glenn* v. *Farmers Bank of N. C.*, 191.

3. It is no ground for a new trial, that the defendant's counsel made a mistake in admitting in the answer the existence of a certain contract, which mistake was not discovered until after the trial, and his Honor did right in refusing it.—*Aston* v. *Craigmiles*, 316.

4. To vitiate and avoid a verdict, it must appear upon the record that undue influence was brought to bear on the jury. All other circumstances of suspicion address themselves exclusively to the discretion of the presiding Judge, in granting or refusing a new trial, which discretion is not a proper subject of review by this Court.—*Moore* v. *Edmiston*, 47.

5. To give parties the benefit of the provision of sec. 299, C. C. P., allowing an appeal from an order granting or refusing a new trial, the presiding Judge should put upon the record the matters inducing the order, so that this Court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not.—*Ibid.*

6. The Court, during the trial, took a recess, when the jury separated and dispersed, the defendant not objecting, nor his Honor charging them not to do so, nor cautioning them against conversing with any one concerning the pending case: *Held*, to be no ground for a new trial.—*Bullinger* v. *Marshall*, 520.

7. *Held, further*, that the defendant being disappointed by a witness who told him the day before the trial that he, the witness, would, if examined, give him, the defendant, a good character, and which the witness did not do, is not such a surprise as will entitle the defendant to a new trial.—*Ibid.*

See EVIDENCE, 12;

" PRACTICE.

NOTICE.

Since the passage of the Act of 1840, (chap. 50, Rev. Code,) a purchaser of land, with notice at the time of a former fraudulent conveyance, is

not protected in his purchase, although he paid value therefor.—*Triplett* v. *Witherspoon*, 589.

See DEEDS OF TRUST.

" SUPERIOR COURT, 3.

OFFICERS.

1. In a suit to recover damages for certain trespasses brought by one Board of Directors of a corporation against another Board, claiming to be the legally appointed Directors of the same corporation:

2. *It was held*, first, that the Board *de facto* in possession of the franchises of the corporation may maintain an action for any trespass respecting the corporate property; and that the acts of such *de facto* officers cannot be collaterally impeached; the proper way of trying the right or title to the office being by an action in the nature of a *quo warranto*: *Held*, second, that the defendants could not justify such alleged trespasses under color of proceedings had by a Justice of the Peace under the provisions of the Revised Code, chap. 40. (Forcible Entry and Detainer,) as the Justice in such case had no jurisdiction. *At., Ten. & O. Railroad Co.* v. *Johnston*, 348.

3. Courts of justice not only redress fraud, but seek to redress fraud by removing temptation. Therefore Presidents and Directors of railroad companies are not allowed to buy up and speculate upon claims against such companies—such contracts being in every respect against good morals, and consequently against public policy. *McDonald* v. *Haughton*, 393.

4. A President *de facto* of a railroad company, when a suit is pending in which his right to the office is to be tried, and just before the decision of such suit, has no right to make a distribution of the funds of the company to such creditors as he may elect to give preference. *Walker* v. *Flemming*, 483.

5. For the ordinary purposes of the company, and in order to keep the machinery in motion, a *de facto* President will be recognized as having power to act. *Ibid.*

See ACTIONS CIV., 4, 5, 6.

OFFICIAL BONDS.

The successor of a former Clerk and Master, who received bonds given for the purchase of certain lands sold by the former, collected the same and misapplied the proceeds, is liable therefor on his official bond, although there was no order for the former Clerk and Master to hand over such bonds to him. *Alexander* v. *Johnston*, 293.

PARTNERS.

See TRUSTS.

PAYMENT.

1. In a suit on a note, the payment of which is relied on as a defence, one of the defendants testified that at the time the note was made, it was agreed that it was to be paid in certain goods, and that the defendants delivered the goods to their agent, to be delivered to a firm, of which the payee was a member, according to such agreement; and the agent testified that he sold and delivered the goods to the firm on the usual time of thirty days, nothing being said about the note: *It was held*, that this was *some* evidence of payment, which ought to have been submitted to the jury, and that his Honor below erred in charging that there was *no* evidence of payment. *Carson & Grier* v. *Lineburger*, 1 3.

2. Where a debtor owes several debts to a creditor and makes payments, he may appropriate such payments to any of the debts he pleases; if, however, he fails to do so at the time, the creditor may appropriate them as he pleases, at any time before suit brought. *Jenkins* v. *Beal*, 440.

3. *Therefore*, where such debts are partly secured by a mortgage of personal property for an amount insufficient to pay all the debts, and the debtor makes no application of his payments as they are made, the creditor is at liberty to appropriate such payments to such part of the debts as is unsecured, and to hold the property mortgaged liable for the unpaid balance. *Ibid.*

See BILLS, BONDS, &c., 10, 15;

" RECEIPT.

PERJURY.

1. In an indictment for perjury, the question whether or not, one of the parties charged with an affray in the indictment, upon the trial of which the oath alleged as false was taken, retreated "thirteen or twelve paces," being surplusage. So too, is the question whether not, one of of said parties was stricken "two or three times," before striking the other party, the number of times being surplusage, where an averment of a blow would have sufficed. *State* v. *Bobbitt*, 81.

2. An averment, that the defendant "deposed and gave in evidence to the jury wilfully and corruptly," amounts to a charge that he *swore* wilfully and corruptly. *Ibid.*

3. A traverse in an indictment, pursuing the words of the defendant in taking the oath, is sufficient in an indictment for perjury. *Ibid.*

PLEADING.

1. The answer of a defendant in an action of slander, alleging that he did not speak the words as charged, with malice, &c., but that he believed them to be true, stating his reasons for such belief; and further, that he did not admit that the words alleged to be slanderous were spoken within six months of the time of bringing the action, amount under our liberal system of pleading, to the pleas of justification, and the statute of limitation. *Moore* v. *Edmiston*, 510.

2. In an action, of the nature of a bill in equity to surcharge and falsify an account taken under a decree in a former suit, if the allegations of the complaint, upon which the plaintiff bases his equity to have such account and settlement re-opened, are denied in the answer, so that material issues of fact or law are raised by the pleadings, such issues of fact must be tried, before a motion of the plaintiff to re-open the account can be entertained. *Houston* v. *Dalton*, 662.

3. When the allegations of a complaint present a case of equitable jurisdiction, as in an action to surcharge and falsify an account, such action is properly instituted in the Superior Court. *Ibid.*

4. The joinder of a motion to amend, by restoring a part of the record in an old equity suit for partition and sale, with a prayer for relief by the correction and re-execution of a deed, is a good ground for demurrer, which is however waived, if the demurrer is not filed in apt time. *Long* v. *Fish*, 647.

5. The amendment may be made by a motion, after notice, in the original cause, to the Judge of the Superior Court, who exercises the jurisdiction heretofore exercised by the Judge of the Courts of Equity. *Ibid.*

6. Where the allegations in a complaint, (praying the correction and re-execution of a deed,) that the fee simple in the land was sold and brought a good price, and that by mistake the word "heirs" was omitted and the seal of the Clerk and Master was not affixed, are not controverted in the answer, or where the answer as to such allegations is so obscure and meaningless as to have no legal effect, and to amount only to a "sham plea," the presiding Judge was right in refusing to submit the issues of fact to the jury, and in adjudging that the correction should be made. *Ibid.*

See ATTACHMENT;

" CLAIM AND DELIVERY, &c.,;

" COUNTY COMMISSIONERS, 4, 5, 6;

" INJUNCTION, 1, 2;

" TENANT BY THE CURTESY, 1, 2.

PRACTICE—CIVIL CASES.

1. There are three modes of trial provided for by the Code:
   1. Trial by jury.
   2. Trial by the Court.
   3. Trial by referees. *Green* v. *Castlebury*, 20.

2. If a reference is made by consent, it is a mode of trial selected by the parties, and is a waiver of the right of trial by a jury. *Ibid.*

3. If no exceptions be taken before the referees, and their report go up without exceptions, and either party desire to except, then and there in term time, he must be permitted to do so. And then his Honor must pass upon them, as if they had been taken before the referees. *Ibid.*

4. Where a report is made under a compulsory reference, and exceptions are filed, and issues made by these exceptions, either party has the right

to have the issues tried by a jury; because, not having waived a trial by jury, as is done when the reference is by consent, the party has a constitutional right to a trial by jury.

Section 246, C. C. P., construed, and the practice under the same settted and fully explained. *Ibid.*

5. In a case of compulsory reference, either party may, at some stage of the proceedings, to be determined by the Court, demand a trial by jury of the issues arising in the report of the referee. But if the reference has been made by consent, the parties waive their right to have such issues tried by a jury, and cannot demand it, after having by such waiver renounced it. (RODMAN, J,, dissenting.) *Armfield* v. *Brown*, 27.

6. The Act of 1866-'79, chap. 59, sec. 2, is repealed by the Act of 1868-'69, and by chap. 121. Bat. Rev., so that a jury trial upon certain issues cannot under the provisions of that Act be now demanded. *Lippard* v. *Roseman*, 34.

7. Parties are entitled to a jury trial in all cases when they have not waived their right to demand it, as they have by a reference by consent. *Ibid.*

8. In a petition for a *certiorari*, as a writ of false judgment, it must be affirmed or shown that a judgment was rendered; if the *certiorari* is applied for as a substitute for an appeal, the party must show that he has been improperly deprived of his appeal, or has lost it by accident. *Burton ex parte*, 154.

9. The Acts of 1870-'71, chap. 42, secs 1 and 2, (Bat. Rev., chap. 18. secs. 1 and 2,) and of 1871-'72, chap. 45, do not change the *venue* of any action; and therefore actions against a Board of County Commissioners must be brought in the county of such Commissioners. *Steele* v. *Commissioners of Rutherford*, 137.

10. An order of Court, sending back a report to a commissioner or referee, is sufficient notice to the party excepting to such report, of its recommitment. *Herring* v. *Murphy*, 164.

11. A commissioner in applying the scale of depreciation to payments and receipts, applied the same at the date the several payments were made and the receipts given: *Held*, to be proper and no ground of exception, in the absence of proof that the party kept on hand the identical money received. *Ibid.*

12. A commissioner reports that the evidence upon which he stated the account, "was the reports of the defendant as guardian to the Court, one voucher for defendant, (which is allowed,) and defendant's affidavit:" *Held*, that was a sufficient statement of the evidence to justify a confirmation of the report. *Ibid.*

13. The presiding Judge, under the old Equity practice, might or might not submit issues to a jury, as he saw fit; and might sustain or disregard the finding of the jury on such issues as he thought best. *Pearson* v. *Caldwell*, 291.

14. If an appellant fails to assign and prove an error, the judgment, although erroneous, must be affirmed. *Utley* v. *Foy*, 303.

15. In our practice, the Judge below is not required to recapitulate the testimony given in on a trial before him a *second* time, although one of th parties may request it to be done.—*Aston* v. *Craigmiles*, 316.

16. The proper practice in a proceeding against an Administrator, who at the time was Judge of Probate, seems to be, to make the summons returnable before him, and then, under the provisions of the act of 1872-'73, chap. 197, transfer the whole proceedings before the District Judge, who will make the necessary orders in the premises.—*Wilson* v. *Abrams*, 234.

17. Exceptions to the report of a referee, that he adopted a former settlement as the foundation of his report; that he stated no evidence upon which he found the facts reported; that he filed no vouchers nor receipts, nor did he refer to any authorizing the disbursements reported; and that he did not state when certain judgments were obtained, are all well taken, and the report was properly set aside.—*Ibid.*

18. When issues are made up by the pleadings, parties have the right to have those material to the determination of the case submitted to a jury; and for the presiding Judge to withdraw such material issues and substitute others, is error.—*Albright* v. *Mitchell*, 445.

19. When the Judge below does not find the facts upon which he overruled the defendant's exceptions, and the defendant not having requested him to find such facts, this Court will remand the case that the facts may be found either by his Honor, or in a *case* under the Code.—*Fronebarger* v. *Lewis*, 456.

20. All questions of practice and procedure as to amendments and continuances arising on a trial in the Court below, are in the discretion of the presiding Judge, from whose judgment thereon there is no appeal.—*Austin* v. *Clarke*, 458.

21. When, in his complaint, the plaintiff demands unliquidated damages, there must be an enquiry to ascertain the amount thereof.—*Mayfield* v. *Jones*, 536.

22. The presiding Judge, on a trial in the Court below, has the power to allow or refuse amendments to the pleadings.—*Wall* v. *Fairley*, 537.

23. Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment, and should be made.—*Perry* v. *Tupper*, 538.

24. In a petition to re-hear, it should appear either that there is error of law apparent on the record, or that testimony has been newly discovered which would materially vary the case. That no pleadings have been filed in a cause before the Probate Court, and that evidence of the witnesses was not taken by question and answer, and signed, are no such grounds of error of law as will entitle a party to have the cause re-heard after final judgment, especially when it appears that such party had every opportunity for a full defence, and of an appeal.—*Williams* v. *Williams*, 665.

25. A re-hearing is not a matter of right, but rests in the sound discretion of the Court, where the parties to a final judgment fail to appeal by their own default.—*Ibid.*

See APPEAL;

" ARBITRATION, &c., 1, 2;

" EXECUTORS, &c., 7.

PRACTICE—CRIMINAL CASES.

1. A motion in arrest of judgment, rests on error upon the face of the record; and any statement of the case by counsel tends to confuse instead of aid the Court, who are obliged to examine the whole record, and pronounce judgment according to the very rights and merits apparent thereon. *State* v. *Bobbitt*, 81.
2. In criminal trials against two or more defendants, the Judge has the right in his discretion to separate the evidence bearing upon the case of each, and to instruct the jury, as to what is competent against one, and incompetent against another. *State* v. *Collins & Blalock*, 241.
3. In trials for capital felonies, the presiding Judge has the right to regulate by reasonable rules and limitations, the arguments in the cause: *Hence*, it is no good ground for a new trial, that the counsel of the prisoner was limited by the Court, in his remarks, to one hour and a half. *Ibid.*
4. When several persons are jointly indicted, they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the Court. *Ibid.*
5. It is no good cause of challenge, that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor. *Ibid.*
6. It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the Special Term, at which he is tried. *State* v. *Ketchey*, 921.
7. Because of a juror's being first cousin to the prisoner, is no good cause of challenge by the prisoner, unless it be shown that ill feeling or bad blood exists between the juror and the prisoner. *Ibid.*

PRESIDENT DE FACTO.

See OFFICERS, 4, 5.

PRIORITY.

See EXEC'RS AND ADM'RS, 11.

PRIVATE EXAMINATION.

See DEEDS, 1, 2.

PROBATE COURTS.

1. In a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, the Judge of Probate, upon proper cause shown, has the right to set the sale aside, and order a resale of the property. *Lovenier* v. *Pearce*, 167.
2. And although the exercise of this right is discretionary with the Judge of Probate, still it is such a matter of legal discretion, involving a "matter of law or legal inference," that an appeal will lie from his decision. *Ibid.*

3. There are *questions* of fact, as distinguished from *issues* of fact which the Probate Judge in cases before him, and the District Judge in cases before him, may decide without a jury. And in a motion made to set aside a sale, it is not necessary for the Judge in case of appeal, to send to the appellate Court a separate statement of the facts upon which his decision rests when the affidavits and counter-affidavits for and against the motion, accompany the case. *Ibid.*

4. Courts of Probate have original jurisdiction of special proceedings for the recovery of distributive shares and legacies which have not been assented to by the executor. When, however, actions for the same have been brought to regular terms of the Superior Courts, the defect is cured by the act of 1870-'71, chap. 108, (Bat. Rev. chap. 17, setions 425, 426.) *Bell* v. *King*, 330.

See GUARDIAN AND WARD, 8.

" PRACTICE, CIV., 16, 24.

PROMISSORY NOTES.

See BILLS, BONDS AND PROMISSORY NOTES.

PUBLIC PRINTER.

The Act of 1869-'70, chap. 43, repeals the act establishing the office of Public Printer; and the Public Printer as now provided for, is not an officer within the meaning of the Constitution. *Brown* v. *Turner and Howerton*, 93.

QUO WARRANTO.

See ACTIONS, CIV., 4;

" OFFICERS, 2.

RAILROAD COMPANIES.

(STOCK IN,) See ACTIONS, CIV., 3;

" " CITIES AND TOWNS, 4;

(NEGLIGENCE,) See NEGLIGENCE, 2;

See OFFICERS, 1, 2, 4, 5.

RECEIPT.

A receipt for a certain sum, in payment of a lost or mislaid note, discharges only so much of said note as such receipt amounts to. *Witherington* v. *Phillips*, 444.

RECORDS.

See EVIDENCE, 6;

" GUARDIAN AND WARD, 6.

REFEREN E AND REFEREES.

See PRACTICE CIV., 1, 2, 3, 4, 5, 10, 17

REGISTRATION.

See DEEDS OF TRUST.

REHEARING.

See PRACTICE, 24, 25;

" SUPREME COURT, 3.

REWARDS.

A person applying for and receiving from a Sheriff a warrant and special deputation to arrest a fugitive from justice, and who executes the warrant and delivers to the Sheriff the person arrested, is not entitled to the reward offered by the Governor for the apprehension of such fugitive. *Malpass* v. *Gov. Caldwell*, 130.

RIOT.

See INDICTMENT, 1.

ROADS.

1. An order, issued by the Township Board of Trustees, appointing a person overseer of a road, is proper evidence of such appointment and is admissible.—*State* v. *Cauble*, 62.
2. Section hands employed on our Railroads at regular wages, are not thereby excused from working on the public highways of the country. *Ibid.*

SALE OF LAND.

See CONTRACT, 10, 11.

" EXEC'RS, &C., 17.

SALE OF LAND FOR ASSETS.

1. Where a tract of land upon which a widow had dower was sold, for the purpose of making assets to pay debts by the administrator of the husband in two separate parts, and she bid off both parts at unequal prices, and the sale was set aside as to the cheaper part: *It was held*, that she had the right to have the sale set aside as to the other part also, where it appeared that she would not have purchased the former part unless she could have got the latter with it.—*Davis* v. *Cureton*, 667.
2. In an application to sell land to pay debts by an administrator *de bonis non*, with the will annexed, when it appears that the first executor assented to and paid the legacies of the testator's personal property, without paying the debts, and that such executor had given a bond for the faithful administration of the assets of his testator, one of the sureties on said bond being at the time of the application solvent, and that the personal property left by the testator was sufficient to pay his debts: *Held*, that the administrator *de bonis non*, &c., must first sue on the bond

of the executor before he can obtain a license to sell the real estate, and that the order directing a sale at this time was erroneous.—*Carlton* v. *Byers*, 691.

See AGREEMENT, 3, 4;

" EXECUTION, 1, 2;

" EXECUTORS, &c., 17;

" PROBATE COURT, 1;

" SHERIFF'S SALE, 2.

SETT OFF.

See COUNTER-CLAIM.

SHERIFFS.

1. Whenever a Sheriff into whose hands an execution is placed, levies the same and advertises a sale, he becomes entitled to his commissions. And if the plaintiff in the execution, receives the amount from the debtor, and orders the same to be returned unexecuted, he makes himself liable for the Sheriff's fees.—*Willard* v. *Satchwell*, 268.

2. A Sheriff, who advertises a sale of land, levied upon under execution to take place on Monday, the first day of the term as prescribed by law, which sale is postponed from day to day, has a right to sell the same on the Friday succeeding.—*Wade & Smitherman* v. *Sanders*, 270.

3. A rule on a Sheriff to show cause why he has not obeyed the mandate in an execution and sold certain land, and the reversionary interest therein, is well answered, by showing that the land had been assigned as a homestead, and by pleading the act of 1870-'71, forbidding the sale of the reversionary interest, and the rule must be discharged.—*Jones* v. *Wagoner*, 322.

4. Until his fees are paid or tendered, a Sheriff is not bound to execute process.—*Johnson* v *Kenneday*, 435.

See NEW TRIAL, 1.

" REWARD.

SHERIFF'S DEED.

See EVIDENCE, 13.

SHERIFF'S SALE.

1. In 1831 and before, in order to subject land to the payment of debts, there was in the first place, a judgment against the personal representative, fixing the debt; and in the second place, a *sci. fa.*, setting out the judgment, and calling upon the heirs to show cause why execution should not issue against the land which had descended. *Therefore*, a purchaser at a Sheriff's sale under an execution unsupported by such judgment and *scire facias*, obtains no title. *Crawford* v. *Dalrymple*, 156.

2. A purchaser of land from one claiming the same under a deed, declared by the jury to be fraudulent, stands on no better footing than such fraudulent donee himself; nor can the deed of such purchaser have any other or greater effect than the deed declared to be fraudulent, except such

purchase was for a valuable consideration, and without notice of the fraud attempted to be perpetrated. *Wade & Smitherman* v. *Saunders*, 270.

3. A bidder for land sold under an execution in his favor, and who received the proceeds of such sale, is not thereby estopped from showing in a subsequent and different proceeding, that the land belonged to some one else other than the defendant in his execution. *Ibid.*

4. A purchaser at a Sheriff's sale, as against the defendant in the execution who withholds possession, is entitled to recover as of course; and the debtor cannot justify his act of refusing to give up the possession on the ground of the title being in a third person. *Ibid*, 277.

See JUDGMENT;
" SHERIFFS, 2;

SLANDER.

See PLEADING.

SPECIFIC PERFORMANCE.

See BILLS, BONDS, &c., 12.

SPECIAL TERM.

See PRACTICE CRIM., 6;
" SUPERIOR COURTS, 4.

STOCK.

(SUBSCRIPTION TO,) See CITIES, &c., 4;
" " " CO. COMMISSIONERS, 5, 6, 7.

SUBROGATION.

See EXECUTORS, &c., 12;
" SURETY, 2.

SUPERIOR COURTS.

1. The Superior Courts have the power to amend a warrant issued by a Justice of the Peace against a person refusing to work the road, by inserting the State as plaintiff instead of the overseer. *State* v. *Cauble*, 62.

2. The Superior Courts, in term time, have, under the Act of 1873-'73, chap. 175, jurisdiction of actions by creditors against administrators. *Johnson* v. *Davis*, 581.

3. The Court below has no power to allow an amendment to an execution, so as to divest the title acquired by a subsequent innocent purchaser, without notice. *Williams* v. *Sharpe*, 582.

4. The Act of 1868-'69, chap. 272, and the Act amendatory thereof, 1871-72, chap. 15, authorizing the Governor of the State to appoint Special Terms of the Superior Courts, are not unconstitutional. And in appointing

such Special Terms, the Governor is not bound by the certificate of the Judge, so far as to confine such terms to the trial of a particular class of cases. *State* v. *Ketchey*, 621.

SUPREME COURT.

1. The Supreme Court has no jurisdiction under the Constitution, to consider the evidence and review the finding of the Court below, in regard to facts, as well as in regard to "legal inference," whether such issues of fact are tried by the Judge or by a jury, or are made by the pleading, as under the old system, or are eliminated by the Court from complaint and answer, or by means of exceptions to a report. *Keener* v. *Finger*, 35.
2. The Supreme Court has no power to compel by process of attachment, a a defendant to pay a judgment against him for costs recovered by a plaintiff in this Court. *Phillips* v. *Trezevant*, 176.
3. A party plaintiff has no right to have a decree re-heard by which certain lands were directed to be sold, (and which afterwards confirmed the sale,) when such party is in no way interested in the proceeds of sale, and did not ask a sale in her original complaint. *Hinton* v. *Hinton*, 730.

See PRACTICE.

SURETY AND PRINCIPAL.

1. The surety on a bond is entitled to all the legal and equitable defences to which his principal is entitled, which attached to or was connected with the debt, evidenced by such bond. And it is competent for such surety to introduce any evidence tending to set up such defence; for instance, to prove a set-off or counter-claim contracted in reference to the debt sued upon. *Jarratt* v. *Martin*, 450.
2. A surety of a judgment debtor, has an equity to be subrogated to the rights of his creditor, when it has been agreed by several creditors of the same debtor, that his land should be sold, although conveyed before their executions became liens, and the proceeds of such sale should be divided in proportion to the amounts of their judgments, the judgment of the caeditor whose debt was secured, being credited with his interest in the proceeds of the sale, so as to diminish the amount to be paid by the surety. And if this agreement, as alleged in the complaint, is denied or controverted by the answer, issues must be made and submitted for the purpose of establishing said agreement before the equities of the plaintiffs can be declared. *Perry* v. *Perry*, 697.

See ABATEMENT, 1;

" EXECUTORS, &c., 12.

TAXES.

1. The provision of sec. 6, (7,) Art. V. of our State Constitution, restraining County Commissioners from levying a tax more than double the amount of the State tax, does not apply to taxes levied to pay debts against the County existing at or before the adoption of the Constitution. *Haughton* v. *Comm'rs of Jones*, 466.

2. The equation of taxation provided for in Art. V, Sec. 1, does not apply to taxes to pay a public debt existing at the adoption of the Constitution, or for special county purposes; nor does sec. 7 of the same Article, forbidding counties to levy more than double of the State tax, apply to such debts. *Street* v. *Comm'rs of Craven*, 644.

3. There is nothing in the Constitution of the State, which prohibits the Commissioners of a county from taxing polls, to pay a county debt incurred before 1868; and there is nothing in that instrument, fixing a maximum of taxation for such purpose. *Brothers* v. *Comm'rs of Currituck*, 726.

See COUNTY COMMISSIONERS, 7.

TENANT BY THE CURTESY.

1. A tenant by the curtesy initiate has a right to sue alone for the possession of his wife's land, and for damages for the detention of it. *Wilson* v. *Arentz*, 670.

2. A complaint by a husband which states that he was married to his wife in 1841, that he had by her several living children, and that she acquired the land in question by a deed executed to her in 1844, is sufficient to show his title as tenant by the curtesy initiate of the land; and the fact that the act of 1848 (Battle's Rev. chap. 69, sec. 43,) deprives him of the power to lease the land, without the consent of his wife, will not prevent his recovery of the land by an action under the C. C. P., without joining his wife as a party. *Ibid.*

See HUSBAND AND WIFE, 2.

TENDER.

1. A promissory note payable in Confederate currency in 1863, is a contract to pay *money*, and not a contract to deliver specific articles: *Hence*, a tender of the money at the day does not satisfy the debt, but only stops the interest.—*Bank of Charlotte* v. *Davidson*, 118.

2. In an action upon such note, where the money tendered had been refused: *It was held*, that although the defendant need not bring into Court the Confederate money, now worthless, he should have accompanied his plea by a payment into Court of the statutory equivalent for such Confederate money: *Held further*, that the plaintiff was entitled to interest from the date of the service of his summons.—*Ibid.*

3. A tender of Confederate money to be valid to stop interest should be accompanied with an offer to pay the scaled value of the note or claim sued upon; otherwise, interest will run from the demand of payment, or from the time the process in the action is served.—*Tate* v. *Smith*, 685.

4. Where it was found on the trial below, that the defendants were ready, able and willing, and offered to pay in Confederate money the amount of two notes due the plaintiff, soon after they fell due in February, 1864, which offer was refused: *Held*, that the offer to pay stopped the interest from the time it was made until the date or service of the summons in the action brought to recover the notes.—*Bank of Charlotte* v. *Stenhouse & McCauley*, 703.

TITLE.

See STATUTE OF LIMITATIONS, 2.

TRESPASS.

See CITIES AND TOWNS, 7, 8;

" OFFICERS, 2.

TRIAL.

See PRACTICE CIV., 1, 4, 5, 7, 13, 18, 21;

" PRACTICE CRIM., 4.

TRUSTS.

A purchase by a man in his own name with funds in his hands of a fiduciary nature, creates a resulting trust in favor of those whose money is employed in the purchase.

Therefore, where land has been purchased with partnership funds, although it be conveyed to one partner only, yet it becomes partnership property.—*King* v. *Weeks*, 372.

(Verbal.) See EVIDENCE, 1.

VENUE.

See COUNTY COM'RS, 2;

" PRACTICE.

VERDICT.

See NEW TRIAL, 4.

WILLS.

1. A testator directed, after giving some pecuniary legacies to certain grandchildren which was a charge upon the whole of his estate, that his "real and personal property remain as a common stock for the family that now make their home here, subject, nevertheless, to any distribution which my executors hereinafter named may think proper to make:" *Held*, that all the living children of the testator, and the representatives of the deceased children, are tenants in common of all the real and personal estate, with partition postponed until circumstances should make it necessary. The separation of the family, and the death of some, and the sale of the interest of one, thereby letting into the family a new and disturbing element, is such a change of circumstances as makes a partition proper. *Dickson* v. *Dickson*, 487.

2. When a legacy is given to a class —— as to the children of —— with no preceding estate, such only as can answer to the call at the death of the testator, can take, for the ownership is then to be fixed. and the estate must devolve upon those who answer the description. *Walker* v. *Johnston*, 576.

3. When, however, there is a preceding life estate, so that the ownership is filled for the time, and there is no absolute necessity to make a peremptory call for the takers of the ultimate estate, the matter is left open until the determination of the life estate, with a view of taking in as many objects of the testator's bounty as come within the description and can answer to the call when it is necessary for the ownership to devolve and be fixed. *Ibid.*

4. A legacy to A, who was *nullius filius*, and who died intestate without children, does not go to the brothers and sisters of his mother, but escheats to the University. *Ibid.*

WITNESSES.

1. Tickets given out by Clerks of Superior Courts in State cases, are only evidences that the witnesses attended; and until the Judge by whom the case was disposed of shall pass upon the costs, including witness fees, and declare how, when and by whom such costs shall be paid, the County Commissioners cannot know their liability, and are not responsible therefor. *Moore* v. *Commissioners of Alamance*, 340.

2. A defendant who offers himself as a witness in his own behalf, may be asked if he has not disposed of his property so as to avoid the payment of any recovery in the action then being tried; and if since such disposal he has not been engaged in selling the same property, and his answers are proper subjects for comment before the jury.—*Lassiter* v. *Phillips*, 402.

3. It is also competent to ask such witness if he had not gone to New York to consult a spiritualist in regard to the money, the subject of the present controversy.—*Ibid.*

4. A plaintiff, who, as a witness, relates a conversation he had with the defendant, which is by the defendant contradicted in a material particular, can corroborate his testimony by showing by another witness that he made substantially the same statement to that witness, soon after the conversation occurred, as he made on the trial.—*Bullinger* v. *Marshall*, 520.

5. A witness may be allowed to express his opinion as to the state of mind of another witness during certain periods; and it is not necessary that such witness should be an expert or a physician.—*State* v. *Ketchey*, 621.

See EVIDENCE, 3;
" NEW TRIAL, 7.

WRIT OF RESTITUTION.

See PRACTICE, 23.